



## HUMAN RIGHTS COMMISSION

**ALS NO.: 11592**

## RECOMMENDED ORDER AND DECISION

This matter comes before me pursuant to an order of default entered against Respondent on November 6, 2002 following its “deliberate, contumacious and unwarranted disregard of the rules of discovery or orders compelling discovery.” Chicago Transit Authority v. Department of Human Rights, 169 Ill.App.3d 749, 754, 523 N.E.2d 1108, 120 Ill.Dec. 197 (1<sup>st</sup> Dist. 1988). A public hearing on damages only was conducted on February 13, 2003 with only Complainant participating. Although given the opportunity to do so, Respondent did not appear at the public hearing and it did not submit any written brief either after the transcript became available or after Complainant’s counsel submitted a petition for attorney’s fees and costs on June 6, 2003.

## Statement of the Case

Complainant was discharged from her employment with Respondent on June 4, 1999. The charge in this case was submitted to the Department of Human Rights (“Department”) on November 19, 1999. In it, Complainant alleged that Respondent discriminated against her by failing to accommodate her alleged disability of alcoholism in violation of the Human Rights Act (“Act”). Following the Department’s investigation of the charge, it filed a complaint with the Commission on behalf of Complainant on July 31, 2001. The complaint charged in one count

that Respondent “discharged Complainant because of her physical handicap, alcoholism/alcohol dependency, in violation of Section 2-102(A) of the Act.”

While there is no verified answer currently in the file, the order of September 25, 2001 recites that because the verified answer was filed, a schedule for discovery and other case activities was entered. Subsequent filings indicate that both parties initiated discovery, culminating in the filing of a motion to compel by Complainant on February 5, 2002, which was granted by order on February 14, 2002. Before the issues raised in the motion to compel could be resolved, Respondent’s counsel filed a motion to withdraw on April 3, 2002 that was granted on May 28, 2002. In that order, Respondent was advised that it must be represented by counsel. Because it was asserted that Respondent had ceased operating, Complainant filed a motion to amend the complaint to add the individual principals of Respondent as parties, as well as the possible corporate successor to Respondent’s business. No response was ever filed to this motion, nor was an order disposing of it entered because Complainant then filed a motion for default judgment on July 9, 2002. With there being no response to the latter motion, it was granted on November 6, 2002. Subsequently, the matter was set for public hearing on damages only on February 13, 2003. The matter is now ready for decision.

### **Findings of Fact**

1. Complainant, Marta Leseiko, filed her Charge No. 2000 CF1882 with the Illinois Department of Human Rights on November 19, 1999, alleging that Respondent, Chase/Ehrenberg & Rosene, Inc., subjected her to discrimination in employment due to her handicap, alcoholism/ alcohol dependency. The Department filed a complaint with the Commission on Complainant’s behalf on July 31, 2001.

2. On November 6, 2002, an order was entered finding that Respondent was in

default due to its conduct during the discovery process in this case. The history of this case recounted above is incorporated in this finding in support of issuance of the default.

3. On December 12, 2002, an order was entered scheduling a public hearing on the issue of damages only for February 13, 2003 at 1:00 p.m. at the Commission's office in Chicago.

4. Only Complainant and her counsel appeared for the public hearing on February 13, 2003. Respondent did not appear or participate in the public hearing.

5. Complainant is not seeking reinstatement to employment with Respondent.

6. Complainant is entitled to an award of \$43,254.36 for back pay.

7. Complainant is entitled to an award of \$30,000.00 for the substantial emotional distress caused by the unlawful discrimination of Respondent.

8. Complainant spent \$16,650.75 on treatment, therapy and medication related to the emotional distress caused by Respondent's unlawful actions and she is entitled to an award in this amount.

9. Complainant is entitled to an award of \$9,194.90 for the additional expense for health insurance she incurred after her discharge.

10. Complainant is entitled to reimbursement for business expenses in the amount of \$7,821.22 that Respondent failed to remit to her after she was discharged.

11. Complainant is entitled to an award of \$7,127.80 for interest she paid on a home equity loan that would not have been taken out but for the unlawful discharge of Complainant by Respondent.

12. Complainant is entitled to an award of \$19,700.00 for attorney's fees and \$586.70 in costs for her prosecution of this matter.

### **Conclusions of Law**

1. Complainant is an “aggrieved party” and Respondent is an “employer” as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/103(B) and 5/2-101(B).

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. In accord with the default order entered on November 6, 2002, Respondent is liable for a violation of the provisions of the Illinois Human Rights Act that prohibit discrimination in employment due to the handicap of the Complainant.

4. Based on the default of Respondent and its failure to effectively dispute or oppose any of the requests made by Complainant with regard to an award for back pay, health insurance costs, interest paid, unreimbursed business expenses, emotional distress or attorney’s fees and costs, Complainant is entitled to an award for each of these elements of loss in order to be made whole. The details of the award are listed at the end of this recommended order and decision, and are incorporated in this finding.

### **Discussion**

#### **A. Default**

As noted in my order of November 6, 2002, the disposition of matters before the Commission by default is not favored, but it may be invoked if a respondent has “shown a deliberate, contumacious and unwarranted disregard of the rules of discovery or orders compelling discovery. (cited authority omitted)” Chicago Transit Authority v. Department of Human Rights, 169 Ill.App.3d 749, 754, 523 N.E.2d 1108, 120 Ill.Dec. 197 (1<sup>st</sup> Dist. 1988). In the present case, Respondent has failed to obey an order compelling responses to properly filed requests for discovery, failed to appear through counsel for all scheduled dates since withdrawal

of prior counsel and a principal of Respondent displayed contempt for the Commission by explicitly refusing to obtain proper representation for it before the Commission when he attempted to appear on behalf of Respondent. Further, Respondent did not submit a post-hearing brief, a reply brief or a response to the petition for fees and costs submitted by Complainant's counsel.

It can only be concluded that Respondent's conduct in this case is deliberate and demonstrates a contempt for the processes of the Commission. Therefore, I recommend that the Commission adopt the order of default entered against Respondent on November 6, 2002.

*B. Damages*

**Back Pay** -- The first element of damages to be considered is Complainant's request for back pay. Because her rate of pay has never subsequently equaled or exceeded the salary she was receiving from Respondent, she is entitled to receive back pay from the date of her discharge to the date of public hearing. Back pay will end with the date of public hearing in that Complainant is no longer seeking reinstatement to her prior position. Tr. 48-9. While the calculation of back pay is always somewhat speculative, the task is made even more difficult when, as in this case, a respondent has deliberately failed to provide information through the discovery process that would make the task more direct. It is the Commission's general principle that any ambiguity in this process be resolved in favor of a prevailing complainant due to the finding of liability against the respondent. Clark v. Human Rights Comm'n, 141 Ill.App.3d 178, 183, 490 N.E.2d 29, 95 Ill.Dec. 556 (1<sup>st</sup> Dist. 1986). This principle must be rigorously followed when a respondent has contemptuously withheld information that could possibly contribute to a more informed calculation of the back pay.

Complainant's Exhibit 12 represents her view of the amount of back pay to which she is entitled, *i.e.*, \$37,004.77. While this exhibit generally tracks her employment history and income after being discharged by Respondent, there are some flaws in the method of calculating the back pay entitlement. The Commission is charged by the Human Rights Act to make successful complainants whole upon a finding of liability for a civil rights violation on the part of a respondent. Therefore, the back pay award will be calculated as follows:

Complainant's 1999 W-2 form from Respondent indicates that she earned \$24,062.43 during the period of January 1, 1999 through her date of discharge, June 4, 1999, a period of five months. Complainant's Exhibit 3. Her monthly income, then, is \$4,678.68 or \$56,144.16 per year. During the last seven months of 1999, Complainant received income from employment of \$11,446.50 and \$8,648.00 from unemployment compensation, a total of \$20,094.50. Her projected income from Respondent during the remaining seven months of 1999 is \$32,750.76. Therefore, Complainant is entitled to an award of back pay for 1999 in the amount of \$12,656.26. The analogous figures for 2000 are: employment income, \$43,716.00 and unemployment compensation received of \$2,336.00, subtracted from her projected annual income if she had remained at Respondent, \$56,144.16; therefore, the back pay award for 2000 is \$10,092.16. For 2001, Complainant had employment income of \$34,501.00 and unemployment compensation of \$10,842.00, again to be subtracted from her projected annual income of \$56,144.16 with Respondent. The back pay award for 2001 is \$10,801.16. Then, for 2002, Complainant's employment income is estimated at \$47,443.30. When subtracted from her projected annual income of \$56,144.16, Complainant is entitled to a back pay award for 2002 in the amount of \$8,700.86. Complainant was unable to furnish an income figure for the first six weeks of 2003, but it is not unreasonable to extrapolate her back pay from 2002 for this short

period of time. Thus, her back pay for 2003 is \$1,003.92 (\$8,700.86 divided by 52 multiplied by six). The total recommended back pay award to Complainant, therefore, is \$43,254.36.

**Emotional Distress** -- Complainant also requests compensation for the emotional distress she suffered due to the discriminatory behavior of Respondent. It has long been established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1<sup>st</sup> Dist. 1989). Here Complainant and her mother testified at the public hearing to the pain and stress caused to Complainant by the actions of Respondent.

As specified in the complaint, Complainant suffers from alcoholism. She testified that her struggle with this disease was well known to her employer, and that one of the principals of Respondent, Merrill Ehrenberg, told her just prior to June 4, 1999 that she should take the time necessary to "check herself in" for treatment. Tr. 14. Accordingly, on Friday, June 4, 1999, Complainant did enter an in-patient treatment program at Northwestern Memorial Hospital in Chicago. On Monday, June 7, 1999, Respondent's office manager sent a letter to Complainant advising her that her employment was terminated effective as of June 4, 1999. She was told of the letter in the midst of her treatment regime at Northwestern on June 9, 1999, although she was not able to read the letter until her discharge from Northwestern on June 11, 1999. Her reaction to this news was "... pretty bad. I couldn't believe it." Tr. 16. She spoke to Mr. Ehrenberg by telephone on June 11<sup>th</sup>, begging him for her job, but "he said no because I wouldn't get well." Tr. 16. On June 14, 1999, the following Monday, Complainant entered an intensive 30-day treatment program at Hazelden in Minnesota (see below for further discussion of this treatment

program). When she returned from treatment and resumed caring for her family, she “lost a lot of sleep ... lost weight ... couldn’t eat ... worrying about the bills ... anxiety.” Tr. 21.

It is apparent from the record that Complainant suffered immediate and severe emotional distress because of her discharge from employment, the consequences of which can be traced from the treatment at Hazelden through counseling and the administration of medication that continues to the present. The degree of emotional distress was significantly over and above that which would be expected from “the mere fact of a civil rights violation” and is therefore compensable under the Human Rights Act. Harris and Vinylgrain Industries of Illinois, \_\_\_ Ill. H.R.C. Rep. \_\_\_ (1996CA1087, August 1, 2001). At the public hearing, Complainant requested an award of \$30,000.00 for the emotional distress occasioned by Respondent’s violation of the Act. Tr. 79. This request is, of course, uncontroverted by any evidence or argument on the part of Respondent, and this lack of response alone supports an award in the amount requested.

I would note, however, that the record even in its present state shows that the extreme reaction of Complainant to her discharge at the hands of Respondent was exacerbated by the condition of alcoholism. But the Commission has found that the perpetrator of a civil rights violation takes his or her victim in the condition in which she or he is found, to include the heightened susceptibility of the victim to emotional distress due to her mental state brought about by another condition such as alcoholism. Under Commission precedent, the “eggshell skull” principle is applicable to the measure of emotional distress damages. Palumbo and Palos Community Hospital, \_\_\_ Ill. H.R.C. Rep. \_\_\_ (1996CA0145, January 10, 2000). It is recommended that Complainant be awarded \$30,000.00 for emotional distress.

**Out-of-Pocket Expenses Related to Emotional Distress** -- A complainant is also entitled to expenses for therapy, treatment and medication that she would not have undertaken



but for the emotional distress caused by the unlawful actions of the respondent. Here, following the termination of her employment, Complainant incurred significant expenses for the intense in-patient treatment and on-going individual treatment related to her alcoholism, but exacerbated by the unlawful discharge by Respondent. As noted above, the in-patient treatment was at Hazelden in Center City, MN, beginning on June 14, 1999. When she first entered the shorter program at Northwestern on June 4<sup>th</sup>, she did not expect or intend on participating in the Hazelden program. Her motivation to do so was directly occasioned by the emotional impact of her discharge from Respondent. Tr. 18.

Based on the record before me, I find that the treatment rendered to Complainant at Hazelden is attributable to Complainant's emotional state caused by her unexpected and unlawful discharge by Respondent. Therefore, she is entitled to full reimbursement for the expense of that treatment. The invoice from Hazelden submitted in evidence by Complainant indicates that her net expenses for this treatment was \$14,610.58. Complainant's Exhibit 5. Therefore, it is recommended that she be awarded \$14,610.58 for these charges related to the emotional aftermath of her discharge from Respondent.

In addition, Complainant presented evidence and testimony regarding her on-going individual treatment and medication. She presented invoices from a licensed therapist in the amount of \$665.00 and from a physician in the amount of \$525.00, for which she received partial reimbursements from insurance in the amounts of \$194.29 and \$112.44 respectively. Complainant's Exhibits 6, 7. Therefore, it is further recommended that she receive \$883.27 for this additional treatment.

Finally, since May, 2002, Complainant has taken the prescription anti-depressant medication Celexa at a cost of \$115.69 per month. Complainant's Exhibit 8. From May, 2002

through February, 2003, the cost of this medication is \$1,156.90. This amount should also be included in the award for emotional distress.

In accord with the analysis presented above, the total amount recommended as the award for expenses related to Complainant's emotional distress is \$16,650.75.

**Health Insurance** -- At the public hearing, Complainant also indicated that she was required to pay for health insurance that she would not have otherwise been required to pay if her employment was not terminated, first under COBRA and later independently. In Complainant's Exhibit 14, the costs of insurance are summarized for the period July, 1999 through February, 2003, for a total of \$9,194.90. Therefore, it is recommended that Complainant be awarded \$9,194.90 for her additional health insurance expense during the period following her discharge.

**Unreimbursed Business Expenses** -- Complainant also submitted a list of business expenses for which she was not reimbursed following her discharge from Respondent. Complainant's Exhibit 15. The total amount shown is \$7,821.22. It is recommended that she also be awarded this amount in order to make her whole.

**Personal Loan Interest** -- Following her discharge, Complainant was compelled to borrow money through a home equity loan to provide support for herself and her daughter in lieu of the salary she was no longer receiving from Respondent. The principal amount of such loans cannot be the subject of an award from the Commission in that an award for back pay compensates the Complainant for the income she would have received but for the unlawful discharge by Respondent. Because the loan amount presumably covered the same expenses for which her salary would have been used, the back pay alone makes her whole in this regard. However, the interest expense associated with the loans would not have been incurred if she had continued to receive her regular salary and she is entitled to an award for this amount. Groh and

Verploegh, \_\_\_ Ill. H.R.C. Rep. \_\_\_ (1991CN1807, May 1, 1997). The interest paid on the home equity loan through January 31, 2003 was \$7,127.80. Complainant's Exhibit 16.

Therefore, it is also recommended that Complainant be awarded \$7,127.80 for the interest expense entailed by this home equity loan.

**Attorney's Fee and Costs** -- As permitted by the briefing order entered on February 13, 2003, Complainant's counsel timely submitted her Petition for Fees on June 6, 2003. In considering petitions for the award of attorney's fees and costs, the Commission requires that any award be fair and reasonable. The most common measure of fees remains the charging of a set rate per hour for work performed in consideration of the client's matter at hand, and multiplying that figure by the number of hours expended. The standard for determining the proper fee award by the Commission is found in Clark and Champaign National Bank, 4 Ill. H.R.C. Rep. 193 (1982).

Just as with the general briefing for this matter after public hearing, Respondent chose not to respond to the petition for fees and costs. The Commission case of Baker and Village of Niles, \_\_\_ Ill. H.R.C. Rep. \_\_\_ (1999CA0319, April 29, 2002) is only the most recent in a long line of cases holding that if the respondent does not contest the particulars of a petition for fees and costs, all issues related to the petition are waived. Here, Complainant's counsel is claiming an hourly rate of \$250.00 per hour. Given the details of her professional background that counsel provided in her declaration attached to the petition, this rate appears to be reasonable in any event, but will be accepted based on Respondent's waiver alone. Complainant's counsel further lists 78.80 hours spent on Complainant's case. All of the hours specified in the petition appear to be reasonable under any standard of evaluation, but will likewise be accepted as

uncontested by Respondent. Therefore, Complainant's counsel should be awarded \$19,700.00 for her representation of Complainant in this matter.

Complainant's counsel has also requested \$586.70 for LEXIS research, photocopying and messenger services as costs incurred in pursuit of Complainant's case. Counsel's declaration indicates that all clients of her firm are informed in advance that they will be billed for these expenses. It is the usual practice of the Commission to reject reimbursement for such costs because it is assumed that law firms absorb them in the general overhead incurred in operating a law practice. However, the Commission will allow these costs when it is the usual practice for the firm to charge its clients for these expenses. Therefore, the full amount of \$586.70 as costs should be awarded to Complainant. The total award for attorney's fees and costs in this matter is \$20,286.70.

\* \* \*

Other elements of the award, as permitted by the cited sections of the Act and the Commission's procedural rules, or otherwise not requiring additional analysis, are specified in the recommendation summary below.

### **Recommendation**

It is recommended that the default entered against Respondent be affirmed, that Respondent accordingly be found liable for a violation of the Human Rights Act as alleged in the complaint, and that Complainant be awarded the following relief:

- A. That Respondent pay Complainant back pay in the amount of \$43,254.36 for the period June, 1999 through February, 2003;
- B. That Respondent pay Complainant interest on all elements of this award contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-

104(J)) and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondent;

- C. That Respondent pay Complainant the amount of \$7,821.22 for unreimbursed business expenses that Respondent owed to her at the time of her discharge;
- D. That Respondent pay Complainant the amount of \$9,194.90 for the cost of her medical insurance coverage for the period July, 1999 through February, 2003;
- E. That Respondent pay to Complainant \$7,127.80 for loan interest she paid on a home equity loan taken out after her discharge from employment with Respondent;
- F. That Respondent pay to Complainant \$30,000.00 for emotional distress;
- G. That Respondent pay to Complainant the amount of \$16,650.75 as her out-of-pocket expenses for treatment, therapy and medication related to the emotional distress caused to her by Respondent's unlawful actions;
- H. That any public contract currently held by Respondent be terminated forthwith and that Respondent be barred from participating in any public contract for three years in accord with Section 8-109(A)(1) and (2) of the Human Rights Act. 775 ILCS 5/8-109(A)(1) and (2).
- I. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers, supervisors and employees be referred to the Department of Human Rights Training Institute (or any similar program specified by the Department) to receive such training as is necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent;

- J. That Complainant's personnel file or any other file kept by Respondent concerning Complainant be purged of any reference to this discrimination charge and this litigation; and,
- K. That Respondent pay to Complainant's attorney of record the amount of \$19,700.00 as attorney's fees and \$586.70 as costs, a total of \$20,286.70.
- L. In that it appears that Respondent is no longer in business under the name shown in the caption of this case, but may be functioning through a successor business organization or through one or more of its principals personally, all elements of this award are understood to be entered against any such successor or individual as otherwise defined by the precedents of the Commission or other applicable law.

## HUMAN RIGHTS COMMISSION

ENTERED:

August 22, 2003

BY: \_\_\_\_\_  
DAVID J. BRENT  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION

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